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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALEJANDRO E. I. P.,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,¹

Defendant.

Case No. 5:17-cv-01644-KES

MEMORANDUM OPINION AND
ORDER

I.

BACKGROUND

On May 2, 2013, Alejandro E. I. P. (“Plaintiff”) filed an application for disability insurance benefits (“DIB”) and supplemental security income (“SSI”) alleging disability commencing March 1, 2010. Administrative Record (“AR”) 212-29.

On April 25, 2016, an Administrative Law Judge (“ALJ”) conducted a hearing at which Plaintiff, who was represented by counsel, appeared and testified,

¹ Effective November 17, 2017, Ms. Berryhill’s new title is “Deputy Commissioner for Operations, performing the duties and functions not reserved to the Commissioner of Social Security.”

1 as did a vocational expert (“VE”). AR 37-69.

2 On May 23, 2016, the ALJ issued a decision denying Plaintiff’s SSI and DIB
3 applications. AR 10-36. The ALJ found that Plaintiff suffered from medically
4 determinable severe impairments consisting of “degenerative disc disease of the
5 cervical spine and lumbar spine (L4-5); and a bipolar disorder (affective
6 disorders).” AR 15. Despite these impairments, the ALJ determined that Plaintiff
7 had the residual functional capacity (“RFC”) to perform a reduced range of medium
8 work with the following limitations:

9 [E]xcept up to six hours of standing and/or walking and six hours of
10 sitting in an eight-hour workday; frequent overhead reaching to include
11 above the shoulder and above the head; frequent climbing of stairs;
12 never climbing ladders or scaffolds; frequent balancing; frequent
13 stooping; frequent kneeling; frequent crouching; frequent crawling;
14 frequently able to understand, remember, and carry out simple,
15 repetitive tasks and make simple work-related decisions; never have
16 interaction with the public; occasional exposure to co-workers; frequent
17 exposure to supervisors; no work where the pace of productivity is
18 dictated by an external source over which he has no control, such as an
19 assembly line or conveyor belt; occasional changes in work routine in
20 a routine work setting; no strict time or high quota demands for
21 production; and he would miss one day of work per month or be off
22 task 10% of the workday.

23 AR 18.

24 Based on this RFC and the VE’s testimony, the ALJ determined that Plaintiff
25 could not perform his past relevant work as a security guard. AR 28-29. The ALJ
26 found, however, that Plaintiff could work as a hand packager, Dictionary of
27
28

1 Occupational Titles (“DOT”) 559.687-074, or a dishwasher, DOT 318.687-010.²
2 AR 30. The ALJ therefore concluded that Plaintiff was not disabled. Id.

3 II.

4 STANDARD OF REVIEW

5 A district court may review the Commissioner’s decision to deny benefits.
6 The ALJ’s findings and decision should be upheld if they are free from legal error
7 and are supported by substantial evidence based on the record as a whole. 42
8 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra v. Astrue,
9 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means such relevant
10 evidence as a reasonable person might accept as adequate to support a conclusion.
11 Richardson, 402 U.S. at 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir.
12 2007). It is more than a scintilla, but less than a preponderance. Lingenfelter, 504
13 F.3d at 1035 (citing Robbins v. Comm’r of SSA, 466 F.3d 880, 882 (9th Cir.
14 2006)). To determine whether substantial evidence supports a finding, the
15 reviewing court “must review the administrative record as a whole, weighing both
16 the evidence that supports and the evidence that detracts from the Commissioner’s
17 conclusion.” Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). “If the
18 evidence can reasonably support either affirming or reversing,” the reviewing court
19 “may not substitute its judgment” for that of the Commissioner. Id. at 720-21.

20 “A decision of the ALJ will not be reversed for errors that are harmless.”
21 Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). Generally, an error is
22 harmless if it either “occurred during a procedure or step the ALJ was not required
23

24 ² The ALJ also found that Plaintiff could work as an electronic assembler,
25 DOT 726.687-058, see AR 30, but there is no such DOT listing. There is a DOT
26 code for an Electronics Assembler found at DOT 726.684-018. In any event, the
27 Court only considers the other two jobs, which are sufficiently numerous. AR 30
28 (finding 58,000 hand packager positions and 500,000 dishwasher positions
nationally).

1 to perform,” or if it “was inconsequential to the ultimate nondisability
2 determination.” Stout v. Comm’r of SSA, 454 F.3d 1050, 1055 (9th Cir. 2006).

3 **III.**

4 **ISSUE PRESENTED**

5 Plaintiff’s appeal presents the sole issue of whether the ALJ properly
6 considered the medical evidence contained in the treating opinion of Lyle
7 Forehand, Jr., M.D. (Dkt. 23, Joint Stipulation [“JS”] at 4.)

8 **IV.**

9 **DISCUSSION**

10 **A. Summary of Dr. Forehand’s Opinions.**

11 In November 2015, treating psychiatrist Dr. Forehand of the Riverside
12 County Department of Mental Health (the “County”) completed an “adult
13 psychiatric assessment” of Plaintiff. AR 444-47. Dr. Forehand diagnosed Plaintiff
14 as suffering from “bipolar disorder, current episode manic severe w/ psychotic
15 features” and “cannabis abuse.” AR 444. His manic symptoms included “[i]nflated
16 self-esteem/grandiose,” and his psychotic symptoms included delusions and
17 hallucinations. Id. Dr. Forehand noted an incident “fueled by cannabis” when
18 Plaintiff had been “tackled by police officers” and arrested as a danger to self or
19 others. Id. Dr. Forehand also noted that Plaintiff had received treatment from the
20 County from March 2013 through October 2015 when his file was “closed due to
21 poor attendance and adherence.” AR 445. Dr. Forehand reported that Plaintiff was
22 able to enjoy hobbies such as photography and guitar playing and had a friend
23 Charlotte “who wants to be his girlfriend and supports him financially.” AR 446.
24 Plaintiff told Dr. Forehand that he had worked security jobs “most recently for 3
25 months in 2010 until fired for refusing to take a lie detector test after a fire.” AR
26 446. Dr. Forehand’s treatment plan was to “get labs; move to less antidepressants
27 and more mood stabilization, and more adherence.” AR 447.

28 In April 2016, Dr. Forehand completed a medical source statement. AR 464-

1 66. Dr. Forehand noted that Plaintiff had been psychiatrically hospitalized in July
2 2011 and August 2013. AR 465. He found that Plaintiff's ability to carry out
3 simple instructions was only "mildly" impaired, while his ability to carry out
4 complex instructions was "markedly" impaired. AR 464. He found that Plaintiff's
5 ability to interact appropriately with others was only "mildly" impaired, while his
6 ability to respond appropriately to usual work situations and changes in routine was
7 "moderately" impaired. AR 465.

8 **B. Claimed Error in the ALJ's Evaluation of Dr. Forehand's Opinions.**

9 The ALJ gave "significant weight" to Dr. Forehand's opinions. AR 27. The
10 ALJ explained this decision as follows:

11 Recently, on April 13, 2016, Dr. Forehand, a treating
12 psychiatrist at Riverside County Department of Mental Health, opined
13 that the claimant has marked impairment only in the ability to
14 understand, remember, and carry out complex instructions on work
15 related decisions [AR 464]. The doctor opined that the claimant
16 otherwise has only mild or moderate limitations in performing the
17 mental aspects of work [AR 464-65]. I give significant weight to this
18 opinion. The opinion is consistent with the longitudinal record in that
19 it supports a finding of a severe mental impairment(s) but not a
20 disabling mental impairment(s). The form the doctor used to give his
21 opinion specifically defines "moderate" as "There is more than a
22 slight limitation in this area but the individual is still able to function
23 satisfactorily" [AR 464]. "Mild" is defined as "[t]here is a slight
24 limitation in this area, but the individual can generally function well"
25 [*id.*]. I agree that the claimant has mental limitations regarding the
26 ability to work, but he is still able to function at least satisfactorily in
27 terms of performing work consisting of simple, repetitive tasks. Dr.
28 Forehand is a treating psychiatrist, and his opinion is relatively

1 consistent with the opinions of the State Agency psychological
2 consultants.

3 AR 27-28.

4 The ALJ further stated that to the extent Plaintiff's RFC might be
5 inconsistent with Dr. Foreland's opinions, the variance was due to the ALJ's
6 consideration of other evidence, Plaintiff's unreliability as a historian, evidence of
7 poor effort during physical examinations (suggesting malingering), and Plaintiff's
8 ability to engage in daily activities which included driving, using public
9 transportation, going to the library, shopping on his own, using a computer, playing
10 the guitar, and learning to play the piano. See AR 19-28, citing, e.g., AR 17, 19,
11 21, 26, 44, 52, 54, 280-281, 394, 396, 446.

12 Plaintiff seizes on the ALJ's finding that Plaintiff is "frequently able to
13 understand, remember, and carry out simple, repetitive tasks and make simple
14 work-related decisions." AR 18. Plaintiff notes that in the Social Security context,
15 "frequently" means up to two-thirds of the workday. (JS at 6.) Plaintiff argues that
16 if the ALJ found that he can only do simple work up to two-thirds of the workday,
17 then the ALJ must have contemplated that he would either do (i) no work or
18 (ii) complex work during the remaining one-third of the workday. (Id. at 7.)
19 Plaintiff reasons that the ALJ did not have the "no work" scenario in mind, because
20 it is inconsistent with the SSA's definition of substantial gainful employment which
21 requires an 8-hour workday. (Id. at 6-7.) Plaintiff further reasons that the ALJ
22 must have had the "complex work" scenario in mind, which is inconsistent with Dr.
23 Forehand's opinion that Plaintiff is "markedly" impaired doing complex work. (Id.,
24 citing AR 464.) Plaintiff concludes that the ALJ failed to give a legally sufficient
25 reason for rejecting Dr. Forehand's opinion. (JS at 7-8.)

26 Defendant argues that the ALJ did not expect Plaintiff to do no work during
27 one-third of the workday, because the ALJ expressly limited Plaintiff's time off-
28 task to 10% of the workday. (Id. at 12, citing AR 18.) Defendant further argues

1 that the ALJ provided a “sufficient rationale for any variance between Plaintiff’s
2 RFC and [Dr. Forehand’s] opinion.” (JS at 13.)

3 **C. Analysis.**

4 It is unreasonable to interpret the RFC as meaning that Plaintiff cannot work
5 one-third of the workday, or that Plaintiff can do complex work one-third of the
6 workday. Rather, the ALJ’s statement was compound; she wrote that Plaintiff was
7 “frequently able to understand, remember, and carry out simple, repetitive tasks
8 **and** make simple work-related decisions.” AR 18 (emphasis added). The most
9 logical interpretation of this statement, considered in the context of the whole
10 decision, is that Plaintiff can do work involving simple, repetitive tasks so long as
11 he is not required to make work-related decisions more often than “frequently.”
12 This is borne out by Plaintiff’s citation to Social Security Ruling (“SSR”) 83-10 as
13 a source for the definition of “frequent.” (See JS at 6.) SSR 83-10 defines
14 “frequent” in the context of exertional limitations, not mental limitations such as
15 limitations to simple, repetitive tasks. In describing mental functioning, the
16 regulations describe levels of mental complexity such as skilled, semi-skilled, and
17 unskilled. See 20 C.F.R. §§ 404.1568, 416.968.

18 For this same reason, Plaintiff has failed to demonstrate prejudicial legal
19 error. Per the DOT, the hand packager and dish washer jobs both have a specific
20 vocational preparation (“SVP”) rating of 2, which equates to unskilled work. See
21 20 CFR §§ 404.1568 and 416.968. Both jobs require reasoning level 2 which
22 requires workers to “apply commonsense understanding to carry out detailed but
23 uninvolved written or oral instructions.” Zavalin v. Colvin, 778 F.3d 842, 847 (9th
24 Cir. 2015) (citing DOT App. C). Reasoning level 2 is consistent with a limitation
25 to simple, routine work. Id.; see also Phothikham v. Astrue, 2011 U.S. Dist. LEXIS
26 39071, 2011 WL 1362079, at *4 (C.D. Cal. Apr. 11, 2011) (collecting district court
27 cases holding that a limitation to simple, repetitive tasks is consistent with
28 reasoning level 2). Plaintiff does not argue that anything in Dr. Forehand’s opinions

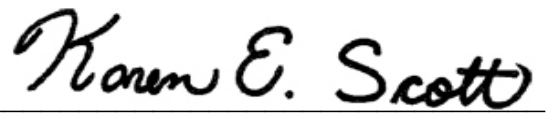
1 (or any other medical evidence) shows that he cannot work as a hand packager or
2 dish washer with the accommodation that he be off-task 10% of the workday.

3 V.

4 **CONCLUSION**

5 Plaintiff's misreading of the ALJ's RFC assessment fails to demonstrate legal
6 error. IT IS THEREFORE ORDERED that judgment shall be entered
7 AFFIRMING the decision of the Commissioner denying benefits.

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9 DATED: August 02, 2018

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11 KAREN E. SCOTT
12 United States Magistrate Judge
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